IN THE MISSOURI SUPREME COURT

Case No. SC85896

STATE EX REL. CHRIS K. RITZ

Relator,

v.

MISSOURI COURT OF APPEALS,
WESTERN DISTRICT OF MISSOURI

Respondent.

On Petition for Writ of Mandamus
Directed to
Missouri Court of Appeals,
Western District of Missouri

RELATOR'S REPLY TO RESPONDENT'S BRIEF

MORRY S. COLE, #46294
Gray, Ritter & Graham, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
Fax: (314) 241-4140

COUNSEL FOR RELATOR

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State v. Owsley, 959 S.W. 2d 789, 793 (Mo. banc 1997)

Morgan v. State, 8 S.W. 3d 151, 153 (Mo. App. S.D. 1999)

Russell v. State, 39 S.W. 3d 52, 54 (Mo. App. E.D. 2001)

ARGUMENT

I. RELATOR IS ENTITLED TO AN ORDER MANDATING RESPONDENT TO ENTER AN ORDER ALLOWING HIM LEAVE TO FILE A SUBSTITUTE/AMENDED BRIEF BECAUSE HE HAS BEEN DENIED AN EFFECTIVE DEFENSE AND MEANINGFUL POST-CONVICTION APPELLATE REVIEW IN THAT HIS COURT-APPOINTED PUBLIC DEFENDER FAILED AND REFUSED TO BRIEF KEY POINTS OF ERROR FROM TRIAL, FAILED AND REFUSED TO TIMELY ADVISE RITZ OF THE STATUS OF HIS APPEAL, FAILED TO INVESTIGATE KEY EVIDENTIARY ISSUES, AND FAILED TO FILE AN APPELLATE BRIEF IN THE WESTERN DISTRICT THAT SET FORTH POINTS OF ERROR FROM WHICH RATIONAL ARGUMENTS FOR RELIEF MAY BE CONSTRUCTED BASED UPON EXISTING LAW THAT RITZ BELIEVES TO BE OUTCOME DETERMINATIVE.

Respondent's primary focus in response to Relator's brief is procedural in nature. Seeking to capitalize on technical arguments to defend its actions and justify the public defender's inaction, Respondent's argument is three-fold: (1) that there is no mandatory duty for the Western District to review or grant Relator's *pro se* motion when he is represented by counsel; regardless of counsel's deficient performance; (2) that there is no right to review the effectiveness of post-conviction counsel; nor should there be; and (3) that Relator's public defender represented Mr. Ritz in a reasonably professional manner; or, since counsel did *something,* he did enough to avoid this Court's scrutiny. Relator replies to each argument in kind.

1. Duty for the Western District to Review or Grant Relator's *pro se* Motion When He is Represented by Counsel

Respondent argues that Ritz's claims are not properly reviewable by a writ to this Court. It claims that entertaining Ritz's motion to dismiss counsel and for leave to file an amended brief through alternative counsel was a discretionary act and that Ritz's motion should never have been considered. To the contrary, when a dispute between defendant and counsel arises, it is the Court's responsibility to inquire into the matter, the defendant's lack of training is immaterial. State v. Owsley, 959 S.W. 2d 789, 793 (Mo. banc 1997)(citing U.S. v. Blum, 65 F. 3d 1436, 1441 (8th Cir. 1995)).

As noted by Respondent, each of our State's Courts of Appeal has a Rule that contemplates such disputes.

Under the Western District's Rule XVI(A) the court "...will accept for filing *pro se* motions in proper form addressing the removal of counsel." Implicit in this rule is the notion that removal of counsel is occasionally required. When does a dispute between client and counsel rise to the level that counsel must be removed? Certainly this case rises to that threshold. Counsel failed to keep Ritz appraised of the progress of his appeal. Counsel failed to: allow Ritz to review pleadings prior to filing; timely provide Ritz a draft or final copy of the Western District brief prior to filing; accept Ritz's phone calls; timely correspond with Ritz; and, brief the points Ritz requested (and for which a rational argument for relief can be fashioned). (See A. 294-298). The public defender even represented to Ritz that, "If, in the end, you disagree with my decisions, you are free to represent yourself on appeal or to hire your own attorney to do so...." (See A. 284). As

Mr. Ritz's case is presently postured, unless this Court grants him relief his public defender's representations are completely untrue. Ritz did not "in the end" get to review any of the public defender's decisions prior to a brief being filed in the Western District.

This amounts to a breakdown in communications – if not an out and out misrepresentation by counsel– for which the Western District should have allowed relief. Respondent argues that, when such a breakdown occurs, "a better procedure would be for counsel to advise the court...." (Resp. Brief at 18 fn2). We agree. However, Ritz's appointed public defender took no steps to inform the Western District of his refusal to timely or effectively communicate with Ritz on his refusal to brief important post-conviction issues.

To prevail on a claim of irreconcilable differences with counsel, the defendant must produce objective evidence of a "total breakdown in communication." State v. Owsley, 959 S.W. 2d 789, 792 (Mo. banc 1997); State v. Parker, 886 S.W.2d 908, 929 (Mo. banc 1994). Here proof of such breakdown in communication is established by the previously cited and briefed correspondence. (See A. 284-298).

Relator asserts that when short court-rule-imposed time limits are running, the failure to timely communicate is essentially a complete failure to communicate. Ritz's appointed counsel failed to even share a copy of any part of his appellate brief with him until well after the time for filing had passed. (See A. 284-298).

2. Right to Review the Effectiveness of Post-Conviction Counsel

Respondent seeks refuge in the well-settled tenet of Missouri law that claims of ineffective assistance of post-conviction counsel are "categorically unreviewable." State v.

Owsley, 959 S.W. 2d 789, 799 (Mo. banc 1997); Waserman v. State, 100 S.W. 3d 854, 862 (Mo. App. S.D. 2003). However "an exception to this rule applies where the record shows that a movant has been abandoned by his postconviction counsel." Morgan v. State, 8 S.W. 3d 151, 153 (Mo. App. S.D. 1999).

"Abandonment" refers to conduct by post-conviction counsel "that is tantamount to 'a total default in carrying out the obligations imposed upon appointed counsel' under appointed counsel' under the rules." Russell v. State, 39 S.W. 3d 52, 54 (Mo. App. E.D. 2001). At the trial court level this Court has recognized claims of "abandonment" in only three situations: (1) where counsel failed to file an amended motion or otherwise take action on Movant's behalf, Luleff v. State, 807 S.W. 2d 495, 498 (Mo. banc 1991); (2) where counsel determined that there was a sound basis for amending the *pro se* motion, but failed to do so in a timely manner, Sanders v. State, 807 S.W. 2d 493, 194 (Mo. banc 1991); and (3) where counsel filed a motion so patently defective that it amounted to a "nullity." State v. Bradley, 811 S.W. 2d 379, 382 (Mo. Banc 1991). A similar analysis should apply to determine "abandonment" by appointed counsel on appeal of the denial of a post-conviction relief motion as occurred here.

In State v. Owsley, 959 S.W.2d 789, 799 (Mo. banc 1997) this Court observed that a lower court's (in that case the trial level) ruling on a motion to dismiss counsel is a legitimate exercise of its discretion and will not be disturbed on appeal unless there is a clear abuse of discretion, and appellate court will indulge every intendment in favor of the lower court. U.S.C.A. Const. Amend. 6. However, on these facts, giving the lower court the benefit of every intendment, it was an abuse of discretion to deny Ritz request to

dismiss counsel. In his motion before the Western District to dismiss counsel and for leave to file a substitute brief, Ritz effectively communicated to the Court of Appeals facts showing irreconcilable differences, a complete breakdown in communications, abandonment and possibly misrepresentation by his appointed public defender. To obtain relief, Ritz had a duty to produce "objective evidence of a breakdown in communication." State v. Owsley, 959 S.W.2d 789, 792 (Mo. banc 1997); State v. Parker, 886 S.W.2d 908.929 (Mo. banc 1994). He has clearly met this burden.

3. Whether Relator's Public Defender Represented Mr. Ritz in a Reasonably Professional Manner.

"Reasonably Professional" is in the eyes of the beholder. The Attorney General's attempt to ratify, condone or even applaud the inaction of its adversary below is tantamount to the fox complimenting a farmer for leaving the door to the chicken coup open. It cannot be said that the public defender's representation of Mr. Ritz was reasonably professional. To fail to return phone calls, timely correspond, share copies of pleadings and most importantly to brief key issues is improper on many levels: professionally, ethically and arguably constitutionally. Such conduct should not be sanctioned in any circumstance, especially when a person's liberty is at stake. Nor should such conduct be ratified as acceptable because claims of ineffective assistance of post-conviction counsel are, generally speaking, categorically unreviewable.

Laudably, the attorney general provides cursory briefing of several of the issues that Ritz's public defender's office failed to look into, argue or otherwise present to the Western District. Such briefing–which is certainly more attention than the points were

given by Mr. Ritz's own appointed public defender on appeal of the denial of his Rule 29.15 motion for post-conviction relief–does not provide sufficient analysis to appraise this Court of the issues that should be presented to the Western District on appeal of the denial of Ritz's 29.15 motion. Further, the points are not ripe for this Court's consideration on the merits in this writ proceeding. The one-paragraph summaries provided in the Attorney General's brief are oversimplifications. The narrow issue presented here is an appropriate remedy to the deficient representation of Ritz by the public defender.

Although the issues raised in Ritz's 29.15 are not presently ripe for final determination before this Court, Relator too will give them a cursory analysis.

In regards to Relator's second and seventh post conviction claims, trial counsel's failure to object to "uh-huh" and "uh-huh, no" answers during the alleged victim's testimony, it is obvious that the nature of the utterance is inherent with ambiguity. In order to correct this ambiguity, counsel should have objected and asked for a verbal answer. A conviction should not rest on the interpretation of the jury and court reporter as to the meaning of non-word utterances.

- As to the failure to call key witnesses, Respondent argues that "trial strategy" would prevent Relator from succeeding on appeal, which is mere speculation. "There are numerous cases in which post-conviction relief has been granted because of counsel's failure to interview witnesses or check out leads." Blankenship v. State, 23 S.W.3d 848, 852 (Mo. App. E.D.2000) (citing State v. Butler, 951 S.W.2d 600 (Mo. banc 1997); Moore v. State, 827 S.W.2d 213; Clay v. State, 954 S.W.2d 344 (Mo.App. 1997)). Moreover, "Counsel has a duty to make reasonable professional investigations or to make a reasonable

decision that makes particular investigations unnecessary." Moore, 827 S.W.2d at 215 (quoting State v. Griffin, 810 S.W.2d 956, 958 (Mo.App. 1991). An argument which is properly based on trial strategy, "is appropriate only if counsel is fully informed of the facts which should have been discovered by investigation." Clay, 954 S.W.2d at 349.

- Respondent's argument insisting counsel is not ineffective for failing to call Relator's mother, another potentially exonerating witness, to testify is a stretch of what reasonable counsel would have done in order to investigate this case. To establish ineffective assistance Relator is only required to prove "witnesses could have been located through reasonable investigation; they would testify if called; and their testimony would have provided a viable defense." Franklin v. State, 655 S.W.2d 561 (Mo.App. 1983); Ladd v. State, 621 S.W.2d 543 (Mo.App. 1981).

- Trial counsel failed to elicit testimony from Relator and other witnesses that Relator's VCR was not in the basement. This was a key and important point at trial that directly contradicted the alleged victim. Counsel for Relator failed to expose this shortcoming of trial counsel through thorough briefing for the Court of Appeal's consideration and ruling. Such a failure can not reasonably be said to be trial strategy, as this is clearly an exonerating fact. For trial strategy to be the basis for denying post-conviction relief, the strategy must be reasonable. Missouri has repeatedly recognized that any holding to the contrary would be to say that any decision of trial counsel no matter how ill-advised could not constitute ineffective assistance. See State v. Owsley, 125 S.W.3d 872, 876 (Mo. banc 2004).

- Trial counsel failed to file a request for a speedy trial. Counsel for Relator failed to provide the Western District Court of Appeals an analysis of the four-factor balancing test outlined in Barker v. Wingo, 407 U.S. 514, 533; 92 S.Ct. 2182, 2193-94 (1972)(length of delay, reason for the delay, defendant's assertion of the right and the prejudice to the defendant). Such analysis may have shown that reasonable minds could differ on the issue and that the point should have been presented.

- Appellate counsel was ineffective for failing to "adequately argue" the sufficiency of the evidence. Perhaps one of the more tenuous arguments set forth in Relator's 29.15 motion, again, this point could be one that has rational basis in the light of the line of cases dealing with trial strategy.

- Trial court error in mid-trial amendment of the count of sodomy to attempted sodomy. There are several cases dealing with the propriety of amending an indictment to conform to the evidence. An argument that this invades the province of the grand jury could have and should have been fashioned. Amending an indictment is improper when an additional or different offense is charged. See State v. Johnson, 811 S.W.2d 411 (Mo. App E.D. 1991). This should have been investigated and briefed.

Lastly, Counsel for Relator urges the Court to consider the tight time constraints that incarcerated litigants face. In Mr. Ritz' case he did all that could be reasonably expected to assist in the furtherance of his own defense. In return he was stonewalled and given short shrift by his appointed attorney who had a professional duty to represent him. His motion to dismiss counsel and file a substitute brief in the Western District should have been granted.

CONCLUSION

Ritz's appointed postconviction counsel, at the trial court and on appeal failed to brief key points of error from trial, failed to timely advise Ritz of the status of his appeal, failed to investigate key evidentiary issues, and failed to file an appellate brief in the Western District that set forth points of error from which rational arguments for relief may be constructed based upon existing law. In essence, Ritz appointed public defender caused a total breakdown in communications and abandoned Ritz on appeal. When a person's liberty and the integrity of the post-conviction review process are at issue the Western District has a duty and obligation to provide relief. For all of the above-stated reasons, the Western District should be ordered to restart the briefing schedule on Ritz's appeal from the denial of his Amended 29.15 motion and allow Ritz leave to file a substitute brief with substitute counsel.

Respectfully Submitted,

GRAY, RITTER & GRAHAM, P.C.

By: _____

Morry S. Cole, #46294
Attorney for Relator
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
Fax: (314) 241-4140

CERTIFICATE OF SERVICE

I hereby certify that two copies of Relator's Reply to Respondent's Brief and a disk with a copy of Relator's Reply to Respondent's Brief was mailed this 11th day of October, 2004, by depositing same in the U.S. Mail, first class, postage prepaid, and addressed as follows:

Mr. Richard A. Starnes
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

_____

Morry S. Cole # 46294
Attorney for Relator
701 Market Street, Suite 800
St. Louis, Missouri 63101
Telephone: (314) 241-5620
Facsimile: (314) 241-4140

RULE NO. 84.06(b) CERTIFICATE

I hereby certify that this Reply to Respondent's Brief complies with the limitations contained in Rule No. 84.06(b) and that this brief contains 2,936 words according to the word count of Corel Word Perfect Version 9.

GRAY, RITTER & GRAHAM, P.C.

_____

Morry S. Cole #46294
Attorney for Relator
701 Market Street, Suite 800
St. Louis, MO 63101
314/241-5620 Phone
314/241-4140 Fax

RULE NO. 84.06(g) CERTIFICATE

I hereby certify that this disk has been checked for viruses in compliance with Rule No. 84.06(g) and that it is virus free.

GRAY, RITTER & GRAHAM, P.C.

_____

Morry S. Cole #46294
Attorney for Relator
701 Market Street, Suite 800
St. Louis, MO 63101
314/241-5620 Phone
314/241-4140 Fax